Nos. 76-529, 76-585, 76-594, 76-603, 76-617, 76-619, 76-620

In the Supreme Court of the United States

OCTOBER TERM, 1976

MONTANA POWER COMPANY, ET AL., PETITIONERS
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN PETROLEUM INSTITUTE, ET AL., PETITIONERS
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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*Additional captions are shown on reverse side.

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

SIERRA CLUB, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

UTAH POWER AND LIGHT COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES,
ET AL., PETITIONERS

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
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OPINION BELOW

The opinion of the court of appeals (Pet. No. 76-529, App. A, pp. 1a-51a) is reported at 540 F. 2d 1114.

JURISDICTION

The judgment of the court of appeals (Pet. No. 76-529, App. C, pp. 91a-94a) was entered on August 2, 1976. The petitions for a writ of certiorari were filed on October 15, 1976 (No. 76-529), October 27, 1976 (No. 76-585), October 29, 1976 (No. 76-594 and No. 76-603), and November 1, 1976 (No. 76-617, No. 76-619, and No. 76-620). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act.

2. Whether the Environmental Protection Agency properly exercised its discretion and complied with the Clean Air Act in promulgating the regulations.

3. Whether a congressional grant of authority to the Environmental Protection Agency to promulgate the regulations is a constitutional delegation of authority and is consistent with the Fifth and Tenth Amendments.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

The Fifth and Tenth Amendments to the Constitution of the United States are set forth in Pet. App. D,[1] pp. 95a-96a.

The Clean Air Act Amendments of 1970, 84 Stat. 1676, *et seq.*, 42 U.S.C. 1857a, *et seq.*, are set forth in pertinent part in Pet. App. E, pp. 97a-112a.

The relevant regulations, 40 C.F.R. 52.01(d) and (f), and 52.21, are set forth in Pet. App. B, pp. 75a-90a.

STATEMENT

Pursuant to the Clean Air Act Amendments of 1970, 84 Stat. 1676, the Administrator of the Environmental Protection Agency established national primary and secondary standards for ambient air quality and the States submitted plans to EPA designed to implement and maintain these standards within their respective boundaries, as required by Section 110(a)(1) of the Act, 42 U.S.C. 1857c-5(a)(1). If the state implementation plans failed to meet the standards of the Act, or if the State did not submit a plan, the EPA Administrator was required to issue a substitute plan for the State. Section 110(c), 42 U.S.C. 1857c-5(c).

[1]Unless otherwise noted, "Pet. App." refers to the Appendix to the Petition in No. 76-529.

On May 30, 1972, one day before the EPA Administrator was to approve or disapprove the various state plans submitted to him, the district court in *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D.C.),[2] issued a preliminary injunction. This prohibited the Administrator from approving any state plan without making it subject to later review by him "to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator" (Pet. App. A, p. 8a). The court further ordered the Administrator to complete this review within four months.

Upon the Administrator's appeal,[3] the court of appeals affirmed on November 1, 1972, relying on the opinion of the district court (Pet. App. A, p. 9a). The court of appeals, which issued no opinion, later denied a stay pending the EPA Administrator's filing of a petition for a writ of certiorari.

In compliance with the district court's order the EPA Administrator, on November 9, 1972, disapproved all state plans "insofar as they failed to provide for the prevention of significant deterioration of existing air quality" (Pet. App. B, p. 53a).

After granting the EPA Administrator's petition for a writ of certiorari and hearing oral argument, this Court affirmed the judgment below on June 11, 1973,[4] by an

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[2]The district court's opinion was filed on June 2, 1972.

[3]The parties had stipulated that the district court's preliminary injunction should be regarded as a final order since nothing further remained for trial and since the district court had, in effect, decided the controlling legal question. See *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n.*.

[4]Twenty States, appearing as *amici curiae*, urged affirmance; two States as *amici* urged reversal.

equally divided Court.[5] *Fri* v. *Sierra Club*, 412 U.S. 541. The EPA Administrator therefore became bound to comply with the district court's preliminary injunction, which appeared to have the effect of a final order in the case.[6]

Accordingly, on July 16, 1973, the Administrator published a notice of proposed rulemaking, setting forth possible programs for preventing significant deterioration that could be included in the state implementation plans (Pet. App. B, p. 54a). "A series of public hearings were held and over 300 written comments were submitted in response to this proposal" (*ibid.*).

This is the background against which the regulations at issue here[7] were promulgated. The regulations limit the deterioration of ambient air quality with respect to two pollutants: particulate matter and sulfur dioxide (SO_2). Under the regulations, areas where air quality is better than the levels set by the national ambient air quality standards are designated class I, class II, or class III areas. The designation determines how much deterioration is "significant," that is, how much deterioration will be allowed in that area. Class I is the most restrictive designation: it allows only slight increases in ambient levels of particulates and SO_2. 40 C.F.R. 52.21 (c)(2)(i). Class II allows more deterioration. *Ibid.* Class III allows deterioration to the level of the national ambient air quality standards. 40 C.F.R. 52.21(c)(2)(ii). All areas are initially designated class II. 40 C.F.R. 52.21(c)(3)(i).

Generally, authority to redesignate areas as either class I or class III is left with the States. 40 C.F.R. 52.21 (c)(3)(ii). As to federal lands, however, the authority is concurrent:

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[5]Mr. Justice Powell took no part in the decision of the case.

[6]See note 3, *supra*.

[7]40 C.F.R. 52.01(d) and (f) and 52.21.

the State may redesignate federal lands, but the federal land manager may also redesignate the land to a more restrictive class than would otherwise apply. 40 C.F.R. 52.21(c)(3)(iii), (iv). The regulations do not attempt to change the existing division of authority between the States and Indian tribes. Therefore, when a State has not assumed jurisdiction over an Indian reservation, the Indian governing body has the authority to redesignate the reservation. 40 C.F.R. 52.21(c)(3)(v). Every redesignation must be based on a public hearing and a record demonstrating that anticipated growth in the area has been considered and that social, environmental and economic effects of the proposed redesignation, and regional and national considerations have been taken into account. 40 C.F.R. 52.21(c)(3)(ii), (iv)(*a*), (v)(*a*). EPA will not approve a redesignation that arbitrarily and capriciously disregards those considerations. 40 C.F.R. 52.21(c)(3)(vi). Neither will EPA approve a state redesignation unless the State has accepted the responsibility to review new sources of pollution in order to determine whether they will exceed the amount of deterioration allowed under the regulations. 40 C.F.R. 52.21(c)(3)(vi)(*a*). (This requirement may be waived if the State lacks legal authority to accept responsibility for such new source review. 40 C.F.R. 52.21(c)(3)(vi)(*f*).)

A procedure for "review of new sources," 40 C.F.R. 52.21 (d), insures that the deterioration limits are not violated. Under this procedure construction or modification of nineteen enumerated stationary sources of particulates or SO_2 may not be commenced unless EPA determines that the new or modified source will not, in conjunction with emissions from other sources in the area, violate the air quality increments. 40 C.F.R. 52.21(d)(2)(i). In addition, the source must use the best available pollution control technology for particulates and sulfur dioxide, which in most cases is the same as the technology already required by EPA's new source standards under Section 111 of the Act,

42 U.S.C. 1857c-6. 40 C.F.R. 52.01(f), 52.21(d) (2)(ii). The authority to review new sources may be delegated to the States under 40 C.F.R. 52.21(f).

Petitions to review the significant deterioration regulations that had been filed in several courts of appeals were transferred to the Court of Appeals for the District of Columbia Circuit. See *Dayton Power and Light Co.* v. *Environmental Protection Agency*, 520 F. 2d 703 (C.A. 6). The court of appeals, after reconsidering its decision in *Sierra Club* v. *Ruckelhaus*, *supra*, held that the Clean Air Act authorized significant deterioration regulations. In the court's view, "[i]t would fly in the face of overwhelming evidence of legislative intent to hold that the Clean Air Act does not contain a requirement of prevention of significant deterioration" (Pet. App. A, p. 23a).

As to the validity of the particular regulations, the industry petitioners argued that EPA had exceeded its statutory authority and abused its discretion because the regulations allegedly were unrelated to the effects of adverse air quality, were unworkable and interfered with authority granted to the States under the Act. The court rejected these arguments and rejected as well petitioners' further contentions that the regulations were unconstitutional because they had no rational relationship to the protection of public health, took private property without just compensation and represented an unconstitutionally vague delegation of authority to EPA (Pet. App. A, pp. 34a-44a, 48a-50a). The court further held that the question regarding the authority of federal land managers and Indian governing bodies to propose redesignation of their lands (see p. 6-7, *supra*) was not ripe for review (Pet. App. A, pp. 45a-48a). As to the contentions of the petitioners representing environmental groups and individuals, the court held that the regulations were not invalid on the basis that air quality in regions designated class III would deteriorate or on the basis that only two of the six primary air pollutants are covered (Pet. App. A, pp. 29a-34a).

After the decision of the court of appeals in this case, the House and the Senate passed different versions of proposed Clean Air Act Amendments of 1976.[8] Both the House and the Senate bills included provisions designed to implement a policy to prevent significant deterioration of air quality, as did the bill that emerged from the Conference Committee.[9] However, Congress adjourned without voting on the conference proposal.

On January 14, 1977, Senator Muskie introduced two bills to amend the Clean Air Act, one of which is the same as the bill passed by the Senate in 1976; each contains requirements specifying how significant deterioration of air quality is to be prevented.[10] Hearings on these bills before the Subcommittee on Environmental Pollution of the Senate Committee on Public Works are now underway.[11]

DISCUSSION

As noted above (p. 4, *supra*), four years ago this Court granted the EPA Administrator's certiorari petition presenting the question whether, under the Clean Air Act, state implementation plans must contain provisions to prevent significant deterioration of air quality. Five

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[8]S. 3219, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. S13543-S13544 (daily ed., August 5, 1976); H.R. 10498, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. H10198-H10201 (daily ed., September 16, 1976).

[9]H.R. Rep. No. 94-1742, 94th Cong., 2d Sess. (1976); see 122 Cong. Rec. H11959, H11970-H11973, H11987-H11988 (daily ed., September 30, 1976).

[10]S. 252 and S. 253, 95th Cong., 1st Sess. (1977), 123 Cong. Rec. S646-S647 (daily ed., January 14, 1977).

[11]Senator Muskie stated that the Senate Committee on Public Works could be expected to report a bill before March 15, 1977 (123 Cong. Rec. S647 (daily ed., January 14, 1977)).

of the petitions in this case raise the same issue.[12] The issue was important in 1972 and it is no less important today. Accordingly, we do not oppose the petitions insofar as they present this issue.

The other issues raised in the seven petitions in this case relate generally to the questions whether the regulations are arbitrary and capricious, whether the regulations were promulgated in accordance with the procedures required by the Act, and whether the regulations violate the Constitution (see p. 7, *supra*). We likewise do not oppose the petitions raising these issues. It is difficult to divorce the question whether the Act authorizes the particular regulations involved here from the broader question whether the Act authorizes any significant deterioration regulations. Indeed, the first question presented in five of the petitions[13] may fairly comprehend the subsidiary issues concerning whether the current EPA regulations conform to the standards of the Act. Many of the arguments of the industry petitioners that the regulations are arbitrary or procedurally defective or violate the Constitution overlap with their arguments that Congress did not intend to authorize any significant deterioration regulations.[14]

In order for the Court to receive a full and complete presentation of the competing contentions in this case, we therefore do not oppose the petitions insofar as they raise issues collateral to the primary question of the EPA

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[12]Pet. No. 76-529, at p. 2 (Question 1); Pet. No. 76-585, at p. 2 (Question 1); Pet. No. 76-594, at p. 2 (Question 1); Pet. No. 76-603, at p. 2 (Question 1); Pet. No. 76-619, at p. 2 (Question 1). See also Pet. No. 76-620, at p. 3 n. 3, concurring in the questions presented in Pet. No. 76-529.

[13]See note 12, *supra*.

[14]Compare Pet. No. 76-620, at pp. 6-18, with Pet. No. 76-529, at pp. 30-37, and Pet. No. 76-585, at pp. 12-26.

Administrator's responsibility with respect to state implementation plans that do not contain significant deterioration provisions.

CONCLUSION

The federal respondents do not oppose the granting of the petitions for a writ of certiorari.

Respectfully submitted.

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FEBRUARY 1977.

DOJ-1977-02